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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-286

OREGON DEPARTMENT OF REVENUE,

Petitioner,

v.

PACIFIC FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is certiorari appropriate to review a decision of the Oregon Supreme Court which:

(1) Is fully in accord with this Court's prior decisions regarding the power of Congress to exempt "federal instrumentalities" from state taxation;

(2) Is fully in accord with this Court's prior decisions regarding the Commerce Clause power of Congress to immunize some commerce from state taxation; and

(3) Does not involve an important question of federal law.

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STATEMENT OF THE CASE

Respondent believes that the following should be included in the Statement of the Case:

On the question of whether federally chartered thrift institutions can be exempted by Congress from state taxation, Respondent stated in its Brief before the Oregon Supreme Court:

> "Although the federal instrumentality doctrine originated in M'Culloch with a constitutional foundation, it is important to note that its assertion here is predicated upon a statute: 12 USCA 1464(h). As Justice Thurgood Marshall said in dissent in First Agricultural National Bank:
>
> > 'I have no doubt that Congress could provide (and has provided, see infra, at 362, 20 L Ed 2d 1152), statutory immunity from state taxation for the federal instrumentalities it may establish.' 392 US at 352. [Res. Br. at 7]

In its discussion of the Commerce Clause, the Oregon Supreme Court examined

the legislative history of Public Law 93-100 and concluded that there is a "rational basis" for Congress to find that the "doing business" tax in question affects interstate commerce. Pacific First Federal Savings & Loan v. Department of Revenue, 293 Or 138, 142, 645 P 2d 27 (1982). The Court held that providing for a tax moratorium while Congress seeks a permanent solution to state taxation which impedes the flow of commerce is a "reasonably adapted" response. 293 Or at 145.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. This Court should not reach the issue of the power of Congress to exempt "federal instrumentalities" from state taxation. If reached, this case would present a question of federal law which has already been settled by this Court.

The power of Congress to enact Public Law 93-100 is supported by both the

"federal instrumentalities" doctrine and the Commerce Clause. The Oregon Supreme Court based its holding on the Commerce Clause; therefore, the federal instrumentalities doctrine only becomes an issue if this Court holds that Congress was not empowered to act under the Commerce Clause.

Petitioner contends that this Court should take this occasion to reexamine the constitutional immunity of federal savings and loan associations from state taxation. Implicit in this request is the necessary recognition that this Court has previously granted such immunity. M'Culloch v. Maryland, 17 US 421, 4 Wheat 316, 4 L Ed 579 (1819) and Pittman v. Homeowners' Loan Corp. of Wash. D.C., 308 US 21, 84 L Ed 11, 60 S Ct 15 (1939). Therefore, the question is settled.

Petitioner's argument for reconsideration is based upon a misinterpretation of Justice Thurgood Marshall's dissent in First Agricultural National Bank v. State Tax Commission, 392 US 339, 355, 88 S Ct 2173, 20 L Ed 2d 1138 (1968).

It is true that this dissent criticizes the exemption of federal instrumentalities from state taxation as a matter of constitutional doctrine. However, in the process, Justice Marshall unequivocally states that Congress can provide statutory immunity from state taxation to federal instrumentalities and that 12 USC § 1464(h) confers federal instrumentality status upon federal savings and loan associations:

> "I have no doubt that Congress could provide (and has provided, see infra, at 362, 20 L Ed 2d 1152), statutory immunity from state taxation for the federal instrumentalities it may establish. 392 US at 352.

* * * *

"* * * the constitutional immunity of federal instrumentalities was just as plain when Congress provided statutory immunity for such agencies as, e.g., the Federal Reserve banks, 38 Stat 258 (1913), 12 USC §531; Federal land banks, 39 Stat 380 (1916), 12 USC §931; many other federal banking institutions;11 392 US at 362.

11. E.g., federal intermediate credit banks, 12 USC §1111; Federal Home Loan Bank, 12 USC §1433; federal savings and loan associations, 12 USC §1464(h)." 392 US at 362, n. 11 (emphasis added).

Thus, this dissent affirms the power of Congress to exempt federal instrumentalities (such as Respondent) from state taxation by statute (such as Public Law 93-100).

2. This Court has already held that Congress is empowered to regulate interstate commerce by immunizing some of it from state taxation.

Petitioner contends that National League of Cities v. Usery, 426 US 833, 96

S Ct 2465, 49 L Ed 2d 245, (1976) and its progeny such as Hodel v. Virginia Surface Mining & Reclamation Association, 452 US 264, 101 S Ct 2352, 69 L Ed 2d 1, (1981) have established a Tenth Amendment bar to Congress's exercise of its otherwise plenary power under the Commerce Clause. Petitioner argues that congressional limitations upon a state taxing power is even more destructive of a state's sovereignty than the attempt to regulate the management and operational aspects of state government which was involved in Usery and Hodel, supra. However, Petitioner misses the distinction which was so clearly stated by the Oregon Supreme Court. Precisely because Usery and Hodel, supra, only involve the regulation of managerial and operational aspects of state government they are not in point here where the issue is the power of Congress to regulate

interstate commerce by immunizing some of it from state taxation.

This Court has recently spoken regarding the power of Congress to regulate interstate commerce by restricting a state's taxing power. In Arizona Public Service Co. v. Snead, 441 US 141, 99 S Ct 1629, 60 L Ed 2d 106, 113, (1979), this Court held as follows:

> "The appellees also argue that if the federal statute is construed to invalidate the New Mexico tax, it exceeds the permissible bounds of congressional action under the Commerce Clause. In view of the broad power of Congress to regulate interstate commerce, this argument must be rejected. (citations omitted). Here, the Congress had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that interference. The legislation thus was within the constitutional power of Congress to enact." (citations omitted).

This was a unanimous decision of the Court with a concurring opinion of Mr. Justice Rehnquist in which Mr. Justice White

joined. Therefore, the Tenth Amendment notwithstanding, this Court continues to hold that the power of Congress under the Commerce Clause is sufficiently broad to permit a federal statute to invalidate a state tax, provided a rational basis exists for finding that the tax interferes with interstate commerce and the method to eliminate that interference is reasonable.

Petitioner has not challenged the Oregon Supreme Court holding that Congress had a rational basis for finding that the doing business tax involved here affects interstate commerce and that the tax moratorium was a "reasonably adapted" response. Rather, Petitioner chose to base its petition upon the Usery line of cases. These cases are not apposite to the issue here.

The core of Petitioner's argument is that congressional power to exempt a

profit-making entity from state tax threatens the economic survival, indeed the very sovereignty of the states. The reach of the Commerce Clause is so extensive that the existence of the States will depend upon the whim of Congress. This reductio ad absurdum argument ignores the limitations imposed in the Snead, supra, case.

For Congress to act, not only must interstate commerce be involved but also Congress must select a response reasonably adapted to eliminate the interference. So it is with Public Law 93-100. This temporary moratorium has what Petitioner concedes is only a minor impact upon its revenue.

The case of State of Arizona v. Atchison, Topeka, and Santa Fe Railroad Company, 656 F 2d 398 (Ninth Circuit,

1981) is a recent example of the application of the Snead, supra, doctrine. There relying on Snead, supra, the Ninth Circuit rejected the State of Arizona's contention that the Tenth Amendment bars the Commerce Clause authority of Congress to regulate Arizona's power to tax property located entirely within its borders. Accordingly, when this Court decided Snead, supra, it resolved the issue of a Tenth Amendment limitation upon the Commerce Clause authority of Congress to regulate state taxation.

3. The decision of the Oregon Supreme Court at issue here does not involve an important question of federal law which should be decided by this Court.

The Oregon Supreme Court based its Commerce Clause holding on its own prior decision in Smith Kline & French v. Tax Commission, 241 Or 50, 403 P 2d 375

(1965) where it stated: "* * * [W]e are convinced * * * that the congressional power over the taxation of the revenues of interstate commerce is supreme." 241 Or at 61, n 2. Therefore, the issue presented by this Petition is well settled by State of Oregon law and does not present any important federal question which should be decided by this Court.

The tax moratorium at issue here only lasted three years. It expired six years ago on September 12, 1976. Respondent is not aware of any other case in the country which involves Public Law 93-100. In most jurisdictions the statute of limitations would bar tax litigation for 1976 or earlier years. Therefore, the only continuing consequences of Public Law 93-100 is a one-time minor revenue loss by the State of Oregon. The precious resources

of this Court should not be wasted on a case of such insignificance.

CONCLUSION

A Writ of Certiorari is not appropriate to review a decision of the Oregon Supreme Court which is fully in accord with this Court's prior decisions regarding federal instrumentalities and the Commerce Clause power of Congress to immunize some commerce from state taxation. Moreover, certiorari is inappropriate because this case does not involve an important question of federal law.

Respectfully submitted,

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